Harco Trucking, LLC *and* Scott Wood. Case 32–CA–20621–1

March 31, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On January 26, 2004, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief. The Respondent filed a brief in reply to the Charging Party's answering brief.

The National Labor Relations Board has considered the decision and the record[1] in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

The judge found that the Respondent violated Section 8(a)(1) of the Act by refusing to hire Scott Wood because he engaged in protected concerted activity. The Respondent's sole defense on exception is that it cannot be found to have unlawfully refused to hire Wood because the refusal to hire occurred before the date that the Respondent was officially incorporated, and that any unfair labor practice was committed by Harco Company, an unrelated entity, not by the Respondent. For the following reasons, we reject the Respondent's defense.

Background

Scott Wood was employed by Harco Company as a low bed truck driver and was laid off on December 24, 2002. In March 2003, Wood filed a lawsuit against Harco Company in California Superior Court alleging that Harco Company had failed to pay the prevailing wages on certain of its job sites. In April 2003, the prevailing wage lawsuit was amended as a class action on behalf of Wood and other similarly situated drivers employed by Harco Company. Harco Company subsequently entered into bankruptcy proceedings, and the assets of Harco Company were sold at a bankruptcy auction in May 2003 to a joint venture named Capurro Trucking/Sierra Rental and Transport Company and Harco Trucking LLC. The joint venture was established by Clint Capurro and Rich Casci.

In mid-May, after the bankruptcy sale, Capurro and Casci took over the management of the business with the approval of the Bankruptcy Court, and hired Larry Chance as dispatcher/manager to assist with the transition. The joint venture then created a new entity, Harco Trucking, LLC, the Respondent herein, but the Respondent did not file its Articles of Organization for a Limited-Liability Company with the Nevada Secretary of State until May 28, 2003. The Respondent's corporate charter was issued on May 29, 2003.

On May 23, 2003, Chance placed an advertisement in the newspaper for, inter alia, low bed truck drivers.[3] Subsequently, Wood heard that the new management was seeking to hire drivers and called Chance to express his interest. He told Chance that he had previously worked for Harco Company and informed him that he had filed the pending class action lawsuit. Chance agreed that Wood should come in the next day for an interview. When Wood appeared for his interview, Chance told Wood that his "chances of working here have been kaboshed [sic]." Chance did not interview Wood and Wood did not file an application. Chance admitted that he told Wood that he would not be employed "because of the pending lawsuit" and that he should not expect to work until the lawsuit was resolved. Chance also testified that the lawsuit was a factor in his decision not to hire Wood. Other drivers were subsequently hired, and the Respondent advertised again for drivers in July 2003.

The judge found that the Respondent violated Section 8(a)(1) of the Act by refusing to hire Wood because he engaged in the protected concerted activity of filing and maintaining the class action lawsuit against Harco Company.

Analysis

The Respondent's sole defense before the Board is that it cannot be responsible for any unfair labor practice that occurred before it officially came into existence on May 29, 2003. The Respondent argues that it is "undisputed that the activity upon which the Complaint was based all took place prior to May 29, 2003."

We reject the Respondent's "corporate non-existence" defense. First, we find that this defense was waived. In its answer to the complaint, the Respondent admitted that *"[a]t all times material herein since about mid-May*

[1] We grant the Charging Party's unopposed request to take judicial notice of a copy of the Respondent's Corporate Information printed from the website of the Nevada Secretary of State.

[2] We shall modify the judge's recommended Order and shall substitute a new notice to conform to the Board's standard remedial language.

[3] The ad stated: **HARCO-Under New Management**. We are looking for Low bed, Flat bed, End dump and bottom dump trained drivers. Experience a must. Call Larry at 775-331-6161

2003, Respondent, a Nevada corporation with a place of business in Sparks, Nevada, has been engaged in the business of hauling materials for construction companies and other companies throughout the western United States." [emphasis added].[4] The Board has held that admissions in an answer are binding on the respondent, even where potentially conflicting evidence is introduced. *Boydston Electric, Inc*., 331 NLRB 1450, 1451 (2000), citing *Liberty Natural Products*, 314 NLRB 630 (1994), enfd. mem. 73 F.3d 369 (9th Cir. 1995), cert. denied 518 U.S. 1007 (1996) (where answer admits complaint allegation that an individual is a supervisor, General Counsel can rely on that admission and does not need to litigate that issue); *United Steelworkers Local 14534 v. NLRB*, 983 F.2d 240, 247 (D.C. Cir. 1993) (where answer admits complaint allegation that striking employees made an unconditional offer to return to work, employer "took this issue out of the case."). See also, *Chipper Express, Inc*., 342 NLRB No. 105, slip op. at 3 (2004). Cf. *D. A. Collins Refractories*, 272 NLRB 931, 932 (1984) (admission loses its binding effect when an amended pleading is filed).

The Respondent did not seek to amend its answer to deny its corporate status or argue its non-existence defense at the hearing. Rather, the Respondent first made this argument in its post-hearing brief to the judge. Accordingly, it is untimely raised. See *Vencare Ancillary Services*, 334 NLRB 965, 969 (2001), enf. denied on other grounds 352 F.3d 318 (6th Cir. 2003) (respondent's 8(g) argument was in the nature of an affirmative defense that was waived by respondent's failure to raise it either in its answer or at the hearing). Thus, the General Counsel was entitled to rely on the Respondent's answer to establish that the Respondent was a Nevada corporation at all material times.

Moreover, the Respondent's admission of its corporate existence at the time of the refusal to hire Wood is consistent with the record in this case. Nevada Revised Statutes Sec. 78.050 states that a corporation commences its existence "[f]rom the date the articles [of incorporation] are filed." The Respondent's corporate charter, issued on May 29, 2003, indicates that the Respondent's Articles of Organization for a Limited-Liability Company were filed on May 28, 2003. Further, the Nevada Secretary of State website confirms that the Respondent's date of incorporation was May 28, 2003, the date that the articles were filed. Thus, we find that the Respondent came into existence on May 28, not May 29 as argued by the Respondent. Accordingly, if the unfair labor practice in this case occurred on or after May 28, there would be no merit to the Respondent's corporate non-existence defense. We find that the record supports such a finding.

Wood, whose testimony was credited by the judge, initially testified that his meeting with Chance occurred at the "[e]nd of May 2003." Later in his testimony, however, Wood stated that he and his attorney filled out the initial charge the same day he met with Chance. The initial charge, alleging that the unfair labor practice occurred on "May 28, 2003 and continuing to date," was signed by Wood's attorney on May 29.

We find Wood's credited testimony sufficient to support a finding that the events occurred on or after May 28. Although Wood was initially imprecise about when the events took place (the end of May), his later more specific testimony, considered together with the date set forth in the charge, would place the meeting as occurring on or after May 28. There is no specific evidence that would establish that the "kibosh" meeting took place before May 28. Accordingly, we find that the record supports a finding that the relevant events occurred on or after May 28, the date of the Respondent's incorporation.[5]

Under all the circumstances, including the Respondent's admission of corporate status in its answer, its failure to seek to amend its answer, its failure to argue its "corporate non-existence" defense at the hearing, and the fact that the record supports a finding that the unfair labor practices occurred on or after the date of incorporation, we agree with the judge's finding that the Respondent violated Section 8(a)(1) by refusing to hire Scott Wood because he engaged in protected concerted activities.

ORDER

The National Labor Relations Board orders that the Respondent, Harco Trucking, LLC, Sparks, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire employees because they engage in protected concerted activities within the meaning of Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[4] The Respondent further admitted that "at all times material herein" Chance was a supervisor and/or agent of the Respondent within the meaning of the Act.

[5] Chairman Battista does not rely on this rationale. He believes that the record is unclear as to when on May 28 the Articles of Incorporation were filed and it is unclear when on May 28 the refusal to hire may have occurred.

(a) Within 14 days from the date of this Order, offer Scott Wood instatement to the position he would have held absent the discrimination against him or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he would have enjoyed absent the discrimination against him.

(b) Make Scott Wood whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful discrimination against him, with interest, as set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files all references to the unlawful refusal to hire Scott Wood, and within 3 days thereafter, notify him in writing that this has been done and that the unlawful conduct will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Sparks, Nevada copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 28, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. March 31, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire employees because they engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Scott Wood instatement to the position he would have held in the absence of the discrimination against him or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he would have enjoyed absent the discrimination against him.

WE WILL make Scott Wood whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful refusal to hire Scott Wood, and WE WILL, within 3 days thereafter, notify him in writing that this has been done, and that the unlawful conduct will not be used against him in any way.

HARCO TRUCKING, LLC

Karen Reichmann, Esq., Oakland, California, for the General Counsel.
Timothy E. Rowe, Esq. (McDonald Carano Wilson), of Reno, Nevada, for the Respondent.
Mark R. Thierman and *Micheline Fairbank, Esqs. (Thierman Law Firm)*, of Reno, Nevada, for Scott Wood.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Reno, Nevada, on December 11, 2003. On June 2, 2003, Scott Wood (Wood) filed the original charge alleging that "Harco Company and its successor in interest, Capurro Trucking" committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). On August 26, 2003, Wood filed an amended charge against Harco Trucking, LLC, (Respondent), using the correct name of the charged party. On August 29, 2003, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(1) of the Act by failing and refusing to hire employee Wood because of his protected concerted activities. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[5] and having considered the briefs submitted by the parties, I make the following.

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a Nevada corporation, with an office and place of business in Sparks, Nevada, where it is engaged in the business of hauling materials for construction companies and other companies throughout the Western United States. Respondent purchased the assets of this business at the end of May 2003. Based upon a projection of its operation since May 2003, Respondent will annually provide services valued in excess of $50,000 to customers who themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or outflow standards. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[5] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings, herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Respondent purchased the assets of Harco Company, including the Harco trademark, in a bankruptcy proceeding in May 2003. Harco Company was engaged in the business of hauling materials for construction companies and other companies throughout the Western United States. After Respondent purchased the assets of Harco Company it operated the same business, out of the same location, using the same equipment. The employees of Harco Company went to work for Respondent without any hiatus in employment.

Wood was employed by Harco Company as a low bed truck driver. Wood was hired in June 2002 and was laid off on December 24, 2002. This layoff was due to a seasonal slowdown and Wood continued to receive health benefits while on layoff status. In March 2003, Wood filed a lawsuit against Harco Company in Superior Court in California, alleging, inter alia that Harco Company had failed to pay the legally required prevailing wages on certain of its jobsites. In April 2003, the complaint was amended as a class action lawsuit on behalf of Wood and the other similarly situated drivers employed by Harco Company.

Subsequently, Harco Company entered into bankruptcy proceedings. The assets of Harco Company were sold at a bankruptcy auction to a partnership, which created a new entity, Harco Trucking, L.L.C., the Respondent. Respondent was aware of the class action lawsuit at the time of the asset purchase.

In mid-May 2003, prior to the official takeover of Harco Company, Respondent took over management of the trucking business with the approval of the Bankruptcy Court. Respondent operated the business with former Harco Company employees and equipment and serviced the former customers of Harco Company. Beginning on or about May 23, 2003, Larry Chance, Respondent's dispatcher/manager, placed an advertisement for low bed, flat bed, front end and rear end dump truck drivers. Wood learned that the new management of the Harco Company was seeking to hire drivers and he sought employment with Respondent.

Wood testified that during the last week of May 2003, he called Chance to express his interest in driving for Respondent. According to Wood, he told Chance that he had worked for Harco Company and had been laid off for the Winter. Wood testified that he told Chance that he was the driver that had filed the class action lawsuit against Harco Company. Chance and Wood agreed that Wood would come in the next day for an interview. The next day, Wood called Chance from outside the facility to confirm that Wood was authorized to enter the property. According to Wood, when he entered Chance's office, Chance was on the telephone. When Chance got off the telephone, he told Wood, "Your plans of working here have been kyboshed." Chance did not interview Wood and Wood did not file a job application. Shortly thereafter, Wood reported these events to his attorney and the original charge was filed.

Chance testified that he told Wood that the driver would not be employed by Respondent "because of the pending lawsuit" and that he should not expect to come back to work "until the

lawsuit was resolved." Respondent hired other drivers and placed another advertisement for drivers in July.

Chance testified that he did not hire Wood because other drivers and employees had indicated that Wood was not a careful driver. Chance admitted that he was originally interested in hiring Wood. Chance also admitted that an office worker of Harco Company told him that she would not hire Wood because of the lawsuit. According to Chance, this conversation raised a "red flag." He testified to having conversations with other employees about Wood's driving only after speaking with the office worker. Wood was the only former Harco Company truck driver not hired by Respondent. Further, Wood received no disciplinary action while employed by Harco Company.

I find Wood's version of these events more credible than that of Chance. Wood knew that it would aid his case to testify that Chance told him that he would not be hired because of the lawsuit. Nonetheless, Wood testified that Chance made no such statement to him. Chance on the other hand, was self-contradictory in his testimony and at one point attempted to testify that he did not make the decision not to hire Wood. He later changed his testimony and stated that he did make that decision. The circumstantial evidence leads me to conclude that Chance questioned employees about Wood's performance after rejecting Wood as an applicant and as a defense to the instant charge. Chance's testimony was very vague as to when he had conversations about Wood's work performance. Further, Chance exaggerated the number of meetings he had with Wood. Chance testified that he "sugarcoated" the refusal to hire Wood by referring to the lawsuit rather than Wood's work performance. Chance did not explain how telling Wood that he should not expect to come back to work "until the lawsuit was resolved," qualifies as "sugarcoating." I find that Chance's testimony was merely an attempt to explain away a very damaging admission. I credit Wood's testimony that Chance simply stated, "Your plans of working here have been kyboshed." It appears that any discussions with other employees about Wood's work performance occurred after this brief conversation.

B. Conclusions

Pursuant to Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. Accordingly, an employer may not, without violating Section 8(a)(1) of the Act, discipline or otherwise threaten, restrain, or coerce employees because they engage in protected concerted activities.

In regard to the Section 7 rights of employees filing civil actions against their employer, the Board has held that the filing of a civil action by a group of employees is protected activity unless done with malice or in bad faith. See *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975); *Host International*, 290 NLRB 442, 443 (1988). Respondent does not deny that Wood was engaged in protected concerted activities in filing and maintaining the class action lawsuit against Harco Company. Rather, Respondent contends that General Counsel has not shown that Respondent was motivated by that activity in not hiring Wood.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983).

In *FES*, 331 NLRB 9, 12 (2000), the Board set forth the following test for a refusal to hire case:

> To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. In sum, the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits. If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established. The appropriate remedy for such a violation is a cease-and-desist order, and an order to offer the discriminatees immediate instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination against them.

In the instant case, Larry Chance, Respondent's chief witness, testified that he told Wood that the driver would not be employed by Respondent "because of the pending lawsuit" and that he should not expect to come back to work "until the lawsuit was resolved." However, the credible evidence establishes that Chance told Wood "Your plans of working here have been

kyboshed". Nevertheless, I find Chance's testimony tantamount to a confession that Respondent ceased consideration of Wood for employment because of the class action lawsuit against his former employer. Not only is such a statement evidence of hostility toward Wood because of his protected activity, but it constituted an outright confession of Respondent's intention to retaliate against Wood because he engaged in protected concerted activities. *American Petrofina Co. of Texas*, 247 NLRB 183 (1980); See, e.g., *NLRB, v. L. C. Ferguson*, 257 F.2d 88, 92 (5th Cir. 1958), and *NLRB v. John Langenbacher*, 398 F.2d 459, 463 (2d Cir. 1968), cert. denied 393 U.S. 1049 (1969). "The Courts pay special attention to such statements against interest when in the unusual case it occurs that a party admits that his conduct, otherwise ambiguous, is for improper purpose or objective." *Brown Transport Corp. v. NLRB*, 334 F.2d 30, 38 (5th Cir. 1964).

For the following reasons, I find that the General Counsel has made a strong prima facie showing that Respondent was motivated by unlawful considerations in refusing to hire Wood. Chance was interested in hiring former drivers of Harco Company and was interested in hiring Wood. However, an office clerical employee told Chance that she would not hire Wood because of the class action lawsuit. Then Chance told Wood that his plans were "kyboshed." Next, Chance spoke to employees in an attempt to defend the failure to hire Wood. It is clear that Respondent excluded Wood from the hiring process and that animus against the protected activitiy (the class action lawsuit) contributed to the decision not to consider Wood for employment.

Thereafter, Respondent hired drivers for positions for which Wood was qualified. Subsequently, Respondent again advertised for truck drivers for which Wood was qualified. Chance knew that Wood had driven for Harco Company and was qualified for these driving positions.

The burden shifts to Respondent to establish that the same action would have taken place in the absence of Wood's protected concerted activities. Respondent has not met its burden under *Wright Line*. Its assertion that Wood may not have been a good driver for Harco Company was not sufficient to overcome the prima facie case. An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must "persuade" that the action would have taken place even absent the protected conduct "by a preponderance of the evidence." *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Betrand Dupont, Inc.*, 271 NLRB 443 (1984). In other words, the mere presence of legitimate business reasons for disciplining or discharging an employee does not automatically preclude the finding of discrimination. *J. P. Stevens & Co. v. NLRB*, 638 F.2d 676, 681 (4th Cir. 1980). Beyond that, "when a respondent's stated motive for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal." (Footnote omitted.) *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991). See also *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Here, while it has been shown that certain coworkers had the opinion that Wood was not careful, there has been no credible evidence that the opinions of these coworkers was the actual reason for the discharge. It appears that Chance did not obtain this information until after he decided that Wood "should not expect to come back to work until the lawsuit was resolved." As stated above, analysis of Chance's testimony shows that it cannot be relied upon to show any reason for the termination of Wood's interview, rather than the class action lawsuit. Where, as here, General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial to overcome a finding of discrimination. *Eddyleon Chocolate Co*., 301 NLRB 887, 890 (1991).

Rather, the evidence leads to a conclusion that, prior to the discussion of Wood and the lawsuit with the office clerical worker, it appears that Chance was interested in hiring Wood as a driver for Respondent. *White Oak Coal Co.*, 295 NLRB 567, 570 (1989). See also *Jones & McKnight, Inc. v. NLRB*, 445 F.2d 97 (7th Cir. 1971). In sum, the General Counsel has shown that the failure to consider Wood for employment in May 2003, had been unlawfully motivated. Thereafter, Respondent hired other drivers for positions for which Wood was qualified. Respondent has failed to credibly show that its refusal to consider Wood for employment and its refusal to hire Wood had been for a legitimate reason. Therefore, I find that Respondent's refusal to hire Wood violated Section 8(a)(1) of the Act.

It is no defense that Respondent acted without union animus or a willful intent to violate the Act. The law is well established that when it is once made to appear from the primary facts that an employer has engaged in conduct which operates to interfere with an employee's statutorily protected right, it is immaterial that the employer was not motivated by antiunion bias or ill intentions." *Fabric Services, Inc.*, 190 NLRB 540, 543 (1971). See also *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964); and *Time-O-Matic, Inc. v. NLRB*, 264 F.2d 96 (7th Cir. 1959). The test is whether the employer engaged in conduct, which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *Continental Chemical Co.*, 232 NLRB 705 (1977), and *American Lumber Sales, Inc.*, 229 NLRB 414 (1977).

Further, it is no defense that Respondent did employ certain former drivers of Harco Company who were named in Wood's class action lawsuit. In regard to employer motivation, the Board has held that an employer's failure to take action detrimental to all known union adherents does not show that its action against some was not for antiunion reasons. See, e.g., *Alliance Rubber Co.*, 286 NLRB 645, 647 (1987); *Master Security Services*, 270 NLRB 543, 552 (1984).

Finally, Respondent seeks to avoid liability because the aborted interview between Wood and Chance occurred prior to Respondent's formal takeover of Harco Company's business operations. It is undisputed that joint venture which was later incorporated as Respondent was operating the business with the approval of the Bankruptcy Court at the time Chance unlawfully eliminated Wood from consideration for employment. Respondent's subsequent hiring of other employees, which forms the basis of the refusal to hire violation, occurred after Respondent was incorporated and officially operating the business.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Scott Wood was engaged in protected concerted activities within the meaning of Section 7 of the Act in filing and maintaining a class action lawsuit, on behalf of himself and his coworkers against his former employer.

3. By failing and refusing to hire Scott Wood because of his protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

4. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Respondent must offer Scott Wood full and immediate reinstatement to the position he would have held, but for the unlawful discrimination against him. Further, Respondent must make Wood whole for any and all loss of earnings and other rights, benefits, and privileges of employment he may have suffered by reason of Respondent's discrimination against him, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); See also *Florida Steel Corp.*, 231 NLRB 651 (1977); and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Respondent must also expunge any and all references to its unlawful refusal to hire Wood from its files and notify Wood in writing that this has been done and that the unlawful refusal to hire will not be the basis for any adverse action against him in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended.[6]

ORDER

Respondent, Harco Trucking, LLC, Sparks, Nevada, its officers agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire employees because they engaged in protected concerted activities within the meaning of Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer reinstatement to Scott Wood to the position he would have held, but for the discrimination against him.

(b) Make whole Scott Wood for any and all losses incurred as a result of Respondent's unlawful refusal to hire him, with interest, as provided in the Section of this Decision entitled "The Remedy."

(c)Within 14 days from the date of this Order, expunge from its files any and all references to the failure to hire Scott Wood and notify him in writing that this has been done and that Respondent's discrimination against him will not be used against him in any future personnel actions.

(d) Preserve, and within 14 days of a request make available to the Board or its agents for examination and copying, all payroll records, timecards, social security payment records, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Sparks, Nevada facilities, copies of the attached Notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since May 29, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

Dated, San Francisco, California, January 26, 2004.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to consider for employment or refuse to hire employees in order to discourage any of these protected activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer reinstatement to Scott Wood to the position he would have held, but for the discrimination against him.

WE WILL make whole Scott Wood for any and all losses incurred as a result of our unlawful refusal to hire him, with interest.

WE WILL expunge from our files any and all references to the refusal to hire Scott Wood and notify him in writing that this has been done and that the fact of this discrimination will not be used against him in any future personnel actions.

HARCO TRUCKING, LLC